

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 December 2003

Case No.: 2003-LHC-0254

In the Matter of

ROBERT L. HAYWOOD,
Claimant

v.

STEVENS SHIPPING & TERMINAL,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:¹

Jonathan B. Israel, Esq.
For the Claimant

Mary Nelson Morgan, Esq.
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER - AWARD OF BENEFITS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (hereinafter referred to as the Act).

On October 29, 2002, this case was referred to the Office of Administrative Law Judges by the Office of Workers' Compensation Programs for a hearing. Following proper notice to all parties, a formal hearing in this matter was held before the undersigned on June 18, 2003, in Jacksonville, Florida. The

¹ The Director, OWCP, was not represented by counsel at the hearing.

record was held open for 45 days until July 30, 2003 for the submission of closing briefs (Tr. 75). All parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder and to submit post-hearing briefs. All briefs have been filed and carefully reviewed.

Stipulations

The parties submitted the following stipulations:

1. The parties are subject to the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*) as extended by the Defense Base Act (Tr. 6);
2. The Claimant and the Employer were in an employee-employer relationship at the time of the injury (Tr. 6);
3. The accident/injury arose out of and in the scope of employment;
4. The accident occurred on July 8, 1999 while aboard ship at Blount Island in Jacksonville, Florida;
5. The Employer had timely notice of the injury on July 8, 1999 (Tr. 7);
6. The Claimant filed a timely claim for compensation (Tr. 7);
7. The average weekly wage is one thousand one hundred ninety-five dollars and ninety-nine cents (\$1,195.99) (Tr. 6-7); and,
8. Temporary total benefits were paid from July 19, 1999 through September 12, 1999, with continuing payment of medical benefits (Tr. 7).

Issues

The issues in this case are:

1. Whether the Claimant's date of maximum medical improvement is September 1, 1999, as set by the IME physician, Dr. Scharf, or January 13, 2000, as set by

Dr. Joseph Czerkowski, the authorized treating physician;

2. Whether, in light of the date of maximum medical improvement, the Claimant is entitled to temporary total disability benefits, or in the alternative, temporary partial disability benefits; and,
3. Whether, due to the Claimant's loss of wage earning capacity, the Claimant is entitled to permanent total disability benefits, or in the alternative, permanent partial disability benefits.

The findings and conclusions that follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

Findings of Fact and Conclusions of Law

Background

The Claimant, Robert L. Haywood, was born on January 28, 1935, and was 68 years old at the time of the hearing (Tr. 10). The Claimant has a high school education with no additional vocational training and has worked as a longshoreman since 1960 (Tr. 10, 64). The Claimant is the holder of a "C" card under the ILA (Tr. 65).

The Claimant's usual job was as a Header, a supervisory position held while maintaining ILA membership (Tr. 34). Although technically a supervisory employee, Mr. Haywood spent most of his actual work day driving vans for the Employer (Tr. 17). Only three out of approximately 1400 local ILA workers had seniority over the Claimant, and as such, Mr. Haywood had a daily choice of any job on the docks (Tr. 35, 39, 72).

The Header was guaranteed work each day, and Mr. Haywood assisted the Employer in picking the crew needed for that day's work (Tr. 34). The Employer used 28 different Headers at the time of the Claimant's injuries, with 12-13 Headers at work on any given day (Tr. 38).

The Claimant was injured while unloading a shipment of cars on July 8, 1999, when the van he was driving hit a pad-eye of the ship, resulting in a fall causing injury to Mr. Haywood's back (Tr. 74). The record is silent as to Mr. Haywood's physical condition from July 9, 1999 through July 23, 1999.

Dr. Joseph Czerkowski, Board certified in Sports Medicine, Pain Management, and Internal Medicine, examined the Claimant on July 23, 1999 (EX 2, p. 12). He noted the Claimant's motor vehicle accident (15 mph, sudden stop) and noted on physical examination that the Claimant's neck showed good range of motion, lacking approximately 15 degrees of rotation and 10 degrees of flexion/extension. Dr. Czerkowski diagnosed low back pain/cervical pain, history of lumbosacral strain/cervical strain, and probable degenerative joint disease of lumbosacral spine. The Claimant was instructed to ice, continue ibuprofen, and was told he could return to modified duty with alternate sitting and standing, no prolonged standing or walking, with limited bending, climbing, and twisting, and lifting, pushing, or pulling not to exceed 10 pounds.

In a follow-up visit with Dr. Czerkowski on August 6, 1999, the Claimant stated that he was improved but continued to have stiffness in the neck and lower back with prolonged standing and overhead work (EX 2, p. 11). Mr. Haywood stated that physical therapy had helped. Physical examination showed mild paracervical muscle spasm. Range of motion of c-spine within normal limits. Spine was non-tender throughout. L-S region significant for mild tenderness in the paraspinal musculature without spasm. Modified duty was continued, with no driving except to work and home, no overhead work; no lifting, pushing, pulling, and carrying over 15 pounds.

In an August 16, 1999 "Treatment Chart," Dr. Czerkowski noted that the Claimant's cervical spine had improved while the lower back seemed worse (EX 2, p. 9). The Claimant had cervical degenerative disease status post fusion C-5/C-6, C-6/C-7 bony spondylosis of cervical spine. Dr. Czerkowski discussed with the Claimant the possible risks and complications of a trigger point injection. Injected Kenalog, Lidocaine, and Marcaine. "Good relief of pain." The Claimant was counseled to continue on modified duty and to finish physical therapy.

Dr. Scharf, an Orthopedic Expert with an area of specialty in the spine, examined the Claimant on September 1, 1999 and was deposed on June 9, 2003 (EX 5, pp. 4-5). He obtained a history from the Claimant, including the Claimant's symptomatology and

an understanding of the work accident underlying the immediate pain (p. 6). The Claimant denied any history of neck or back trouble prior to the accident (p. 6). Upon examination, the Claimant moved around fairly easily and did not appear to be under any acute discomfort (p. 6). Alignment of the spine was normal; no muscle spasm, near full ranges of motion in cervical and lumbar spines; excellent muscle tone; no root tension signs, no neurological abnormalities (pp. 6-7). There was no objective sign of injury (p. 7). Any limitation of range of motion was diagnosed as due to age (p. 7). X-ray evaluation showed "a lot of degenerative changes in [the Claimant's] lower back. He had degenerative disc disease throughout his entire lumbar spine from L1 to S1. He had an MRI of his lumbar spine which is also consistent with the degenerative changes. There was no evidence of any injury to his spine on the x-rays" (pp. 7-8).

Dr. Scharf's impression was that the Claimant had suffered a spinal strain that had healed by the time of the examination with no objective orthopedic pathology other than one would expect from normal aging (p. 8). Dr. Scharf opined that the Claimant could be gainfully employed as a van driver (p. 8). Dr. Scharf testified that he was familiar with the job description of a van driver, and that he had been out to the docks and reviewed the jobs on-site (p. 8). He saw no problem with the Claimant returning to the dock in a full-time capacity (p. 9). He placed no restrictions on Mr. Haywood's ability to return to work (p. 11).

Dr. Scharf did not feel the Claimant was making his pain up, but he opined that there was no objective evidence pointing to an orthopedic cause (pp. 12-13). Dr. Scharf stated that a complaint of pain does not mean that a person has an injury that restricts him or her from returning to work (p. 13).

Dr. Scharf noted that the Claimant has been through physical therapy, has used heat and ice for pain, and has denied any prior history of back or neck trouble (EX 5b, p. 3). On a Florida Maximum Medical Improvement Permanent Impairment Certification Form, Dr. Scharf listed a maximum medical improvement date of September 1, 1999, with a zero percent (0%) permanent impairment (EX 5b).

In a September 7, 1999 follow-up examination, Dr. Czerkowski released the Claimant for modified work duty, with restrictions to alternate sitting, standing, and limited walking, no prolonged standing or walking, limited climbing, bending or twisting, lifting, pushing, and pulling not to exceed

20 pounds (EX 2, pp. 7-8). The Claimant was to continue physical therapy. The Claimant was improving but very slowly, with stiffness and pain in both cervical and lumbar spine. Cervical range of motion very limited side bending, to only 5 degrees. Forward flexion and extension was decreased very minimally.

In response to a September 20, 1999 letter from vocational expert Rick Robinson, Dr. Czerkawski disagreed that the Claimant could at that time be gainfully employed as a van driver (EX 2, p. 6). Dr. Czerkawski stated that the Claimant had objective findings that prevented him from performing that particular job classification.

In a September 28, 1999 follow-up examination, Dr. Czerkawski reviewed the report of Dr. Scharf and noted a significant discrepancy between his diagnosis and Dr. Scharf's (EX 2, p. 5). Cervical spine was doing better; lumbar spine seemed to be improved. Spurlings and axil compression. The Claimant still suffered from underlying spondylosis and status post fusion C-4/C-5, C-5/C-6, C-6/C-7. Dr. Czerkawski opined that the Claimant had more underlying disease than he would estimate from normal aging. "Will put [Claimant] back to full duty. I have not given [the Claimant] MMI, as per Dr. Scharf."

The Claimant returned to work on the docks for one day in October 1999, resuming work as a driver (Tr. 65). He testified that the vibration and bouncing of the van made his lower back and neck hurt. He left work after one four-hour shift and never returned to work, either as a driver or in any other position or job classification available on the docks (Tr. 66).

In an October 20, 1999 "Treatment Chart," Dr. Czerkawski noted that "we had a long discussion with [the Claimant], and I think the injury that we are seeing is mainly underlying osteoarthritis. I do think he has objective findings. I think he is able to have gainful employment, with some driving work I think would be acceptable with his range of motion" (EX 2, pp. 3-4). Discussion with the Claimant regarding the arthritic fusion of his neck and his bony spondylosis. Definite finding of cervical spondylosis, which is non-work related. Diagnosis of bony spondylosis and osteoarthritis changes of the spine, non-work related; decreased cervical range of motion and probable facet arthritic changes, also non-work related; cervical strain, improved.

Dr. Czerkowski re-examined the Claimant on December 6, 1999 (EX 2, p. 2). "We are not making any progress." The Claimant has degenerative disease in both the lumbar and cervical spine. He is post status fusion C-5/C-6, C-6/C-7, spondylosis at multiple levels. The Claimant has a functional impairment and is capable of mild to moderate duty. The Claimant is MMI today with 3% impairment rating for cervical spine and 3% impairment for lumbar spine. The Claimant was given a 6% permanent disability rating.

On January 10, 2000, the Claimant suffered a heart attack (Tr. 74). He testified that prior to the heart attack, he could walk quite a bit, but afterwards slowed down his life and abilities considerably (Tr. 69).

Dr. Czerkowski met with Mr. Haywood on January 13, 2000 to discuss the results of an ordered functional capacity evaluation (Tr. 8). Dr. Czerkowski discussed final permanent work restrictions based upon the results of the functional capacity evaluation (Tr. 8). Dr. Czerkowski re-assigned maximum medical improvement to January 13, 2000 based on the implementation of a new, albeit similar, set of work restrictions for Mr. Haywood (Tr. 8, 19).

Dr. Czerkowski examined the Claimant on February 18, 2000 and noted that he was able to do light duty "which he agrees with" (EX 2, p. 1). The Claimant denied any numbness or tingling. Diagnosis of chronic low back pain; degenerative disease on top of low back strain, underlying condition not work related. The Claimant should resume light duty as outlined in his functional capacity evaluation.

Dr. Orlando G. Florete, Jr.,² examined the Claimant on April 11, 2000, upon referral from Dr. Czerkowski to the Baptist Institute of Pain Management (CX 1, p. 1). Dr. Florete noted the driving accident causing the work-related injury and noted that the Claimant is on Darvocet. Dr. Florete noted that the Claimant was placed on MMI on December 6, 1999 with a 6% impairment rating and that the Claimant had been cleared for light duty by the results of his function capacity evaluation. Mr. Haywood complained of sharp pain in lower back which is constant and radiates down into the legs and into the feet. Almost any movement aggravated the pain. The use of pain medications and heat decreased the level of pain. Dr. Florete

² The record contains no listing of Dr. Florete's expertise or areas of medical specialty.

reviewed a past history of hypertension, arthritis, and past surgeries including hernia, knee, and prostate operations. Upon physical examination, Dr. Florete noted cervical paravertebral muscles are mildly spastic, a decrease in range of motion of the cervical spine, with full range of motion of lower back with pain. He diagnosed chronic neck and low back pain secondary to cervical and lumbar mechanical strain, with a suspicion of cervical and lumbar degenerative joint disease.

In a follow-up visit on April 17, 2000, Dr. Florete noted that views of the lumbar spine had been obtained, including the oblique projection (CX 1, p. 5). Upon review of the new data, Dr. Florete diagnosed moderate to severe lumbar spondylosis, noting neural foraminal encroachment at all levels due to disk space narrowing and marginal osteophytes as well as degenerative disease of the articulating facets, particularly the L4/L5 and L5/S1 levels.

On May 4, 2000, Dr. Christopher Roberts³ examined the Claimant and diagnosed chronic lower back pain, chronic neck pain, severe spondylosis, and neuro foraminal encroachment due to degenerative disc and joint disease (CX 1, p. 6). Dr. Roberts suggested an MRI for further evaluation and suggested that a series of epidural steroid injections may give symptom control.

Following an MRI, the Claimant attended a follow-up visit with Dr. Florete on July 10, 2000 (CX 1, p. 8). Review of the MRI showed severe spondylosis of the lumbar spine from L1-L2 to the L5-S1 level. Physical examination showed exquisite tenderness on palpation of the lumbar paravertebral borders. The muscles of the lumbosacral spine were still spastic. The Claimant was scheduled to undergo a series of lumbar epidural steroid injections while continuing to take Darvocet.

Dr. Florete gave the Claimant a lumbar epidural steroid injection on July 24, 2000 (CX 1, p. 1), a lumbar epidural steroid injection, left L3-L4, L4-L5, and L5-S1 facet joint injections with fluoroscopy on July 31, 2000 (CX 1, p. 12), and a lumbar epidural steroid injection on August 7, 2000 (CX 1, p. 14). The Claimant reported a partial reduction in pain following the first two injections. Dr. Florete gave the Claimant left L3-L4, L4-L5, and L5-S1 facet joint injections

³ The record contains no listing of Dr. Roberts' expertise or areas of medical specialty.

with fluoroscopy on August 14, 2000 (CX 1, p. 16). The Claimant reported a reduction in pain following previous injection.

In a follow-up appointment with Dr. Florete on October 9, 2000, the Claimant reported that injective therapy was not providing any significant long-term relief (CX 1, p. 18). Medications provided some relief, but significant pain continued. Dr. Florete placed the patient at maximal medical improvement. The Claimant was instructed to continue taking Darvocet.

The Claimant filed for and received normal ILA Retirement benefits effective March 1, 2001 (EX 6). He testified that he had no intention of returning to any type of work after filing for retirement (Tr. 73).

On January 4, 2002, Dr. Florete gave the Claimant a lumbar epidural steroid injection and a bilateral sacroiliac joint injection with fluoroscopy (CX 1, p. 20).

On June 18, 2002, Dr. Czerkowski approved the following job classifications for the Claimant, "as is" (EX 4).

1. Walking Boss - Auto Ship Header. 4-8 hours per shift; frequent walking and standing required; occasionally lift/carry less than 10 pounds, bending/squatting, climbing.
2. Van Driver - Auto Ship. 4-8 hours per shift; infrequent walking, standing, bending/squatting, climbing, kneeling; sitting required when driving vehicle; lifting under 10 pounds; occasional twisting of neck and back.
3. Header - Auto Ship. 4-8 hours per shift; frequent walking, standing; occasional need to lift less than 10 pounds, pushing, twisting of neck and back, bending, squatting, climbing.
4. Auto Flagman/Traffic Director. Frequent standing, walking; infrequent sitting, climbing, bending; no squatting, kneeling, twisting of neck and back, pushing, pulling; occasional lifting less than 5 pounds.

5. Header/Container Operations. 8 hours per shift; frequent standing; occasional walking, climbing, balancing, twisting of neck and back.
6. Header/Stacker Gang. 8 hours per shift; frequent walking, standing; occasional bending, squatting, lifting of less than 10 pounds, twisting of neck and back; no climbing.
7. Flagman. Frequent lifting of 0-20 pounds, standing; occasional walking, climbing, balancing, stooping, squatting; no kneeling, bending.

Dr. Czerkowski approved with modifications the job classifications of Lasher - Auto Ship, Auto Gang-Driver, and Auto Gang-Lasher for the Claimant. Dr. Czerkowski disapproved the job classification of Lineman.

Dr. Czerkowski reiterated the findings of his treatment notes in his June 16, 2003 deposition (CX 2). Dr. Czerkowski testified that although he had listed the Claimant's MMI date in notes as December 6, 1999, he didn't discuss with the Claimant what he felt were going to be permanent work restrictions for the Claimant's back until January 13, 2000 (p. 8). Dr. Czerkowski listed permanent restrictions as occasional lifting less than 50 pounds and frequent lifting up to 25 pounds (p. 9). Dr. Czerkowski testified that in approving the above-listed job classifications, he utilized results of a functional capacity exam which indicated that the Claimant should be able to complete certain types of activities (p. 13).

Dr. Czerkowski stated that he has not been to Blount Island to evaluate the actual jobs performed there, nor did he know how the individual employees are hired each day (p. 14). He testified that he never took the Claimant off of work, but kept him on modified duty status throughout treatment (p. 18). Dr. Czerkowski stated that the last time he examined the Claimant, in February 2000, he was capable of gainful employment (p. 22).

Vocational Experts

1. Rick Robinson, a rehabilitation counselor, met with the Claimant to supervise his employment rehabilitation (Tr. 42). Mr. Robinson is familiar with the ILA classified work that is performed daily at the docks in Jacksonville (Tr. 44). Of the jobs approved for the Claimant by Dr. Czerkowski, Mr. Robinson has watched each job being performed on the docks with the exception of the Line Handler position (Tr. 50).

Mr. Robinson noted that the Baptist Institute of Pain Management has approved the job classifications of container ship header, stacker gang header, flagman, and auto flagman, while disapproving the classification auto/van driver (Tr. 57). Mr. Robinson stated that a "header" position at Stevens would include the same job duties as a header position at any other employer on the docks (Tr. 45). Mr. Robinson opined that if, for some reason, Stevens had no header positions open on a given day, a header position would likely be available with one of the other dock employers (Tr. 45).

Mr. Robinson noted that most of the Claimant's work was done with auto ships (Tr. 47) and that Jacksonville Port Authority has shown an increase in auto ship dockings in Jacksonville every year since 1999 (Tr. 46).

Based upon the restrictions placed on the Claimant by Dr. Czerkowski, Dr. Scharf, and the Baptist Institute of Pain Management, Mr. Robinson opined that the Claimant would have no problem gaining subsequent dock employment post-injury (Tr. 50). However, if dock employment was unavailable, the Claimant's age, education, and work experience would leave the Claimant with an earning capacity, non-waterfront, of about seven dollars per hour.

2. Gilbert Spruance, a vocation expert (Tr. 16), noted that the Claimant had spent the last 10 years primarily as a van driver (Tr. 16). Mr. Spruance noted that the Claimant often drove cars off and onto ships as a car driver (Tr. 16), and that the Claimant had some limited experience as a winch operator (Tr. 17). Mr. Spruance acknowledged that he has spent little time at the docks, and that he has no personal knowledge of how waterfront jobs are handled on a day-to-day basis or how union members work together to make job classifications interact efficiently (Tr. 21).

Mr. Spruance noted the job classifications approved by Dr. Czerkowski and found his approvals to be at times inconsistent (Tr. 17). The doctor approves some classifications, but then seems to put work restrictions in place which would preclude Mr. Haywood from performing the task required (Tr. 19).

Mr. Spruance opined that if the Claimant could not perform his usual waterfront work, he would be confined to sedentary and light category work (Tr. 18). Given the Claimant's age, education, and work history, Mr. Haywood would likely be restricted to entry level work in the \$5-7 per hour range (Tr. 18).

DISCUSSION AND APPLICABLE LAW

Date of Maximum Medical Improvement

The determination of when maximum medical improvement ("MMI") is reached is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 B.R.B.S. 248 (1988). An Administrative Law Judge must make a specific factual finding regarding MMI, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Eng'rs*, 14 B.R.B.S. 395, 401 (1981). Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for an Administrative Law Judge to find that MMI has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 B.R.B.S. 246, 245 (1986).

Dr. Scharf examined the Claimant on September 1, 1999, stating that the Claimant had reached MMI as of that date (EX 5). Dr. Scharf opined that although he believed the Claimant was not making up his complaint of pain, Dr. Scharf could find no orthopedic cause for the pain (EX 5, pp. 12-13).

Dr. Czerkowski was the Claimant's treating physician from July 1999 through February 2000 (CX 2, p. 5,7). Despite Dr. Scharf's MMI diagnosis, the Claimant returned to Dr. Czerkowski on September 7, 1999, where the Doctor found enough improvement in the Claimant's condition to reduce some work restrictions (EX 2). A September 28, 1999 visit showed further improvement, inducing Dr. Czerkowski to state that he intended to return the Claimant to "full duty" (EX 2). Dr. Czerkowski then declared the Claimant was at MMI on December 6, 1999 (EX 2).

After Dr. Czerkowski's MMI declaration, he had the Claimant perform a functional capacity evaluation (EX 2, p. 8). After that test was administered, Dr. Czerkowski met with the Claimant to reassess final work restrictions (EX 2, p. 8). With the new medical data provided and with new work restrictions based upon the functional capacity evaluation, Dr. Czerkowski reassigned MMI to January 13, 2000 (Tr. 8, 19).

The visits by the Claimant to physicians after January 13, 2000 focused on symptom control and not on improvement of injury. As the Claimant showed improvement in his condition after Dr. Scharf's September 1, 1999 MMI date, I find Dr. Scharf's determination of MMI less reliable and I afford it less weight.

Dr. Czerkowski had a continuing, extensive review of the Claimant, his ongoing ranges of motion and description of pain, which the Doctor then used to evaluate the effectiveness of various treatments. Although Dr. Czerkowski set an initial date of December 6, 1999, the Doctor admitted that he set this date without all of the medical information necessary to make a final evaluation. When Dr. Czerkowski received the functional capacity evaluation, he adjusted the MMI date to reflect both his final evaluation based on the latest data available and his discussion of that final evaluation with Mr. Haywood. I find the date of MMI to be January 13, 2000.

The Nature, Extent, and Duration of the Claimant's Disability

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 B.R.B.S. 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 B.R.B.S. 155, 157 (1989).

The Claimant has the initial burden of proving total disability, as well as the burden of proving that the disability is permanent. *Eckley v. Fibrex and Shipping Co.*, 21 B.R.B.S. 120 (1998). To establish a *prima facie* case of total

disability, the Claimant must prove by a preponderance of the evidence that he cannot return to his regular or usual employment due to his work-related injury. The Claimant need not establish that he cannot return to any employment, rather only that he cannot return to his usual employment. *Elliot v. C & P Tel. Co.*, 16 B.R.B.S. 89 (1984). If the Claimant satisfies this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 B.R.B.S. 171 (1986).

The standards for determining total disability are the same regardless of whether temporary or permanent disability is claimed. *Bell v. Volpe/Head Construction Co.*, 11 B.R.B.S. 377 (1979). The degree of the Claimant's disability, i.e. total or partial, is determined not only on the basis of physical condition, but also on other factors, such as age, education, employment history, rehabilitative potential, and the availability of work. *New Orleans (Gulfwide) Stevedore v. Turner*, 661 F. 2d 1031, 1038 (5th Cir. 1981). Thus, it is possible under the Act for a claimant to be deemed totally disabled even though he may be physically capable of performing certain kinds of employment. *Id.*

Upon review of the medical evidence discussed in detail above, I find that the preponderance of such evidence proves that the Claimant suffered from a physical injury caused by a work-related accident which occurred on July 8, 1999.

Any disability suffered by the Claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 B.R.B.S. 231 (1994). I find, therefore, that prior to the MMI date of January 13, 2000, the Claimant is entitled to, at most, temporary disability benefits under the Act.

Under current case law, the employee has the initial burden of proving total disability. See *Eckley, supra*. To establish a *prima facie* case of total disability, the Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Id.* "Usual" employment is the Claimant's regular duties at the time he was injured. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 B.R.B.S. 689 (1982). Even a minor physical impairment can establish total disability if it prevents the employee from performing his usual employment. *Elliot v. C & C Tel. Co.*, 16 B.R.B.S. 89 (1984). Further, the Claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 B.R.B.S.

20 (1989). On the other hand, a Judge may find an employee able to do his usual work despite his complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro. Area Transit Auth.*, 13 B.R.B.S. 337, 339 (1983).

The Claimant testified that his usual work was to drive vans and cars as a Header with Stevens (Tr. 34). Such a position required the Claimant to work a four to eight-hour shift, with frequent walking and standing, and occasional pushing, twisting of neck and back, bending, squatting, climbing, and lifting of less than 10 pounds (EX 4). Dr. Scharf saw no objective findings that would prevent the Claimant from work-related driving or from completing the above-listed physical tasks (EX 5). Dr. Czerkowski found on September 28, 1999 that the Claimant could return to full duty (EX 2, p. 5). He re-evaluated Mr. Haywood's condition on October 20, 1999, however, and only at that time did he permit "some" work-related driving (EX 2).

In response to the September 28, 1999 visit with Dr. Czerkowski, the Claimant attempted to work his usual employment in early October 1999 (Tr. 65). The Claimant testified that the vibration and bouncing of driving a van made his lower back and neck hurt, so he left work after one four-hour shift (Tr. 66). The Claimant did not try to return to work, nor did he attempt to perform any other job classification available on the docks (Tr. 66).

While Dr. Scharf found no spine-related injury which would preclude the Claimant from returning to his usual work, he acknowledged that the Claimant was not making up his complaint of pain, and he opined that if the injury was a soft-tissue injury, he would not be able to diagnose it through the testing performed (EX 5, pp. 12-13).

At this initial stage, the Claimant need not establish that he cannot return to any employment, only that he cannot return to his former usual employment. *Elliot v. C & P Tel. Co.*, 16 B.R.B.S. 89 (1984); *Manigault v. Stevens Shipping Co.*, 22 B.R.B.S. 332 (1989). I find that the Claimant has established a *prima facie* case of temporary total disability prior to MMI. The complaints of pain are credible and consistent during the period, prohibiting him from returning to his former usual employment of driving cars and vans.

If the Claimant makes this *prima facie* showing, the burden shifts to the Employer to show suitable alternate employment. *Clophus v. Amoco Prod. Co.*, 21 B.R.B.S. 261 (1988). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 B.R.B.S. 332 (1989); *MacDonald v. Trailer Marine Trans. Corp.*, 18 B.R.B.S. (1986), *aff'd*, (No. 86-3444) (11th Cir. 1987) (unpub.). The Employer is not required to act as an employment agency for the Claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d, 031, 1042-43, 14 B.R.B.S. 156, 164-65 (5th Cir. 1981), *rev'g* 5 B.R.B.S. 418 (1977); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1330, 12 B.R.B.S. 660, 662 (9th Cir. 1980). The trier of fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 B.R.B.S. 232, 236 (1985); *Southern v. Farmers Export Co.*, 17 B.R.B.S. 64, 66-67 (1985).

Although the Claimant experienced pain while driving on his lone four-hour attempt to return to work, there were several job classifications available that did not require driving, including various header positions and flagman positions (See EX 4). Rick Robinson, a vocational counselor, was familiar with the jobs performed on the docks on a daily basis. He opined that based upon Mr. Haywood's medical restrictions, the Claimant would have no problem gaining subsequent dock employment (Tr. 50). Gilbert Spruance, while less encouraged about the Claimant's future waterfront employment, admitted that he was unfamiliar with the jobs being done on the docks and that he had never seen any of those jobs being performed.

I find that while the Claimant was precluded from his usual job of driving vans and cars on the docks due to chronic back pain, there were several other job classifications that fit within the Claimant's medical restrictions as laid out by both Dr. Scharf and Dr. Czerkowski. Such work was generally available seven days a week, and the Claimant had seniority over all but three union dockworkers at the Jacksonville docks. I find that the Employer has proven suitable alternative employment.

If the Employer establishes suitable alternate employment, the employee can nevertheless prevail if he demonstrates that he diligently tried and was unable to secure employment. *Hairston*

v. Todd Pacific Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. West State Inc.*, 31 B.R.B.S. 118 (1997); *Hooe v. Todd Shipyards Corp.*, 21 B.R.B.S. 258 (1988). Along with diligence, the Claimant must also establish a willingness to work. *Turner*, 661 F.2d at 1043.

The Claimant asserts no argument that he diligently tried to secure employment. Mr. Haywood tried to work one four-hour shift in October 1999, and then admitted that he never tried to return to work either as a driver or in any other position or job classification (Tr. 66).

I find that the Claimant was temporarily totally disabled from the date of injury, July 8, 1999, through the date that he reached MMI on January 13, 2000. While the Claimant was still experiencing back pain at MMI, all of the vocational experts opined that several positions were available on the dock that fit within Haywood's final January 13, 2000 MMI work restrictions. After his one four-hour shift in early October 1999, the Claimant did not diligently attempt to secure any type of employment within those final restrictions, and he was unwilling to work in any position or job classification on the dock. Such a lack of diligence and unwillingness to work precludes Mr. Haywood from obtaining total temporary disability benefits beyond the date he reached MMI.

The Claimant argues that his ongoing injury entitles him to permanent total disability benefits post-MMI, or in the alternative, at least permanent partial disability benefits (Claimant's Post-Hearing Brief, p. 8).

Permanent total disability is an employee's inability to earn any future wages. *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 B.R.B.S. 474 (1978). Permanent partial disability is disability less than total and is classified as a loss of wage earning capacity. *Spencer v. Baker Agric. Co.*, 16 B.R.B.S. 205 (1984). If the Claimant is offered a job at his pre-injury wages, the Judge can find that there is no lost wage-earning capacity and that the Claimant, therefore, is not disabled. *Swain v. Bath Iron Works Corp.*, 17 B.R.B.S. 145, 147 (1985).

The burdens for establishing permanent disability are the same as for temporary disability. After the Claimant establishes a *prima facie* case of disability at MMI, the burden shifts to the Employer to show suitable alternative employment, or as in this case, the ability of the Claimant to resume his regular duties.

Dr. Scharf and Dr. Czerkowski both released the Claimant to some form of modified work status by September 28, 1999. Between September 1999 and the date of MMI, January 13, 2000, Dr. Czerkowski's method of treatment shifted from injury-related treatment to treatment for nonwork-related issues such as degenerative disk disease and spondylosis.

This nonwork-related treatment continued until January 10, 2000, when the Claimant suffered a heart attack (Tr. 74). Before the heart attack, the Claimant testified that he could walk quite a bit, but that after the heart attack, he slowed his life down considerably (Tr. 69).

Following his heart attack, the Claimant received treatment from the Baptist Institute of Pain Management. While an initial visit diagnosed muscular strain, after objective testing was completed, the Baptist Institute physicians changed their diagnoses to nonwork-related degenerative problems and correspondingly shifted treatment to symptom control and not to improvement of a work-related injury.

The Claimant sustained a work-related injury due to the accident of July 8, 1999. I find that the injury sustained, however, healed itself somewhere between July 1999 and January 13, 2000, the date that Mr. Haywood reached MMI. I find that the Claimant continued to suffer from nonwork-related disease and pain subsequent to that point. The Claimant has failed to establish a *prima facie* case of disability post-MMI.

However, even had the Claimant met this initial burden, I find that the Employer established suitable alternative employment as described above. I further find that the Claimant failed in rebuttal to establish that he diligently sought employment. Mr. Haywood made a conscious decision not to return to work, as demonstrated by the fact that he chose never to seek work of any type after his lone four-hour shift with the Employer in October 1999.

Finally, I note the Claimant's attempt to develop an argument based upon the Claimant's ongoing taking of pain medication (Claimant's brief, pp. 4-5). While treatment notes sporadically mention pain medication, the record as a whole does not state the type, amount, dose, side effects or possible impairment caused by such medication. Further, Dr. Scharf, Dr. Czerkowski and the Baptist Institute of Pain Management all knew of the medications being taken by the Claimant, and all of

them released the Claimant to work with restrictions that did not include any notice or reference to restrictions based upon impairment due to medications.

I find, therefore, that the Claimant has failed to establish post-MMI disability due to the July 8, 1999 work-related injury.

Entitlement

The evidence in the record supports the conclusion that Robert L. Haywood was totally disabled and, thus, entitled to temporary total disability benefits from the date of injury, July 8, 1999, through the date of MMI on January 13, 2000. I find that the Claimant's average weekly wage at the time of injury was \$1,195.99.

Attorney Fees

No award of attorney's fees for service to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for Claimant's counsel to submit an application. The application must conform to 20 C.F.R. § 702.132, which sets forth the criteria on which the request will be considered. The application must be accompanied by a Service Sheet showing that service has been made upon all parties, including and Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

Based on the Findings of Fact and Conclusions of Law expressed herein, it is, hereby ORDERED that:

1. The Employer, Stevens Shipping and Terminal, shall pay the Claimant, Robert L. Haywood, compensation for temporary total disability for the period of July 8, 1999 through January 13, 2000, representing the period the Claimant was unable to work due to his disability. The exact computation of benefits will be performed by the District Director, based on the Claimant's average weekly wage of \$1,995.99, in accordance with the provisions of § 8(c) of the Act. 33 U.S.C. § 908(b).

As noted by stipulation, the Employer has paid temporary total disability benefits for the period of July 19, 1999 through September 12, 1999, and the total disability awarded is to be credited by all amounts previously paid by the Employer.

2. The Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); *Grant v. Portland Stevedoring Co., et al.*, 16 B.R.B.S. 267 (1984).

A

Robert L. Hillyard
Administrative Law Judge

Dated:

at Cincinnati, Ohio